

## Staff Summary Report

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**Council Meeting Date:** 05/15/2008

**Agenda Item Number:** \_\_\_\_\_

**SUBJECT:** Request approval of a resolution authorizing the adoption of a "License for Special Use – Right of Way Encroachments" for the City of Tempe.

**DOCUMENT NAME:** 20080515PWCH06 **RIGHT OF WAY ACQUISITIONS (0905)**  
**RESOLUTION NO. 2008.20**

**SUPPORTING DOCS:** Yes

**COMMENTS:** This License for Special Use will be administered and appropriate fees be charged by the Department of Public Works in those cases where development of private properties adjacent to the street rights of way would apply for the use of these city properties to augment the use of the private property. These uses could involve areas above or below the grade of the street as well as surface encroachments.

**PREPARED BY:** Larry Shobe, Engineering Services Administrator (x8417)

**REVIEWED BY:** Andy Goh, Deputy PW Manager/City Engineer (x8896)

**APPROVED BY:** Glenn Kephart, Public Works Manager (x8205)

**LEGAL REVIEW AS TO FORM:** Cynthia McCoy, Assistant City Attorney (x2187)

**FISCAL NOTE:** N/A

**RECOMMENDATION:** Adopt Resolution No. 2008.20 and authorize the Mayor to execute any necessary documents.

RESOLUTION NO. 2008.20

A RESOLUTION BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE ADOPTION OF A LICENSE FOR SPECIAL USE PROCEDURE TO ASSIST IN THE REGULATION OF THE PRIVATE USE OF RIGHTS OF WAYS AND OTHER CITY PROPERTIES.

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WHEREAS, public rights of ways and public properties are held in trust by the city for public use to ensure the health, safety and welfare of the residents of the city, it has been determined to be in the best interest of the City of Tempe to regulate the private use of the street rights of ways and other city properties within its borders.

WHEREAS, the City of Tempe wishes to adopt a License for Special Use and charge appropriate fees for such uses to accomplish said regulation of City rights of ways and properties, and

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, MARICOPA COUNTY, ARIZONA, AS FOLLOWS

**SECTION I.** That the City of Tempe does hereby adopt said License for Special Use procedure and fees as written.

Resolution No. 2008.20

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PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE,  
ARIZONA this \_\_\_\_\_ day of May, 2008.

\_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

## **Attachment A**

### **License for Special Use – Right-of-Way Encroachments -**

#### **Licenses for at grade, below grade, and above ground uses**

In order to ensure the health, safety, and welfare of the residents of the City, the City of Tempe holds public rights-of-way and public properties in trust for City and public use. The City Engineer is charged with the responsibility to oversee the use, maintenance and disposition of city streets and rights-of-way.

The City has the discretion to issue revocable permits, short term leases, or long term leases for certain encroachments into public rights-of-way and easements. These permits and leases are subject to specific requirements and cannot adversely affect the present or future public use of the rights-of-way or easement.

Approval by the City Engineer is required for these encroachments, which may include construction or maintenance of any building, structure, fence, barrier, or other infringement that is within, above, or upon any public rights-of-way or public property.

The cost for a non-City entity to utilize public property or City streets (at, below, or above grade) is based on a percentage of the value imputed to the real property at the surface.

#### **Primary Considerations:**

- A) Concerns when considering encroachments above grade are air, light, and view quality within the streetscape; traffic safety; and maintenance of the right-of-way. Potential above grade requests include balconies and connecting structures over streets for residential, commercial, and resort use.
- B) Concerns when considering encroachments below grade are placement and maintenance of existing and future City utility facilities. The below grade uses currently allowed include public utility crossings and City utilities. Private utilities are discouraged.

- C) Concerns when considering surface encroachments are safety to both pedestrians and traffic users. Potential surface uses include landscape and landscape maintenance, building facades, private parking access facilities and building entries.

Additional Considerations:

- 1) Parking and storage uses have been requested in the past but are not normally granted because of the need to coexist with major city services.
- 2) Parking and/or access into above or below grade parking uses of the existing street rights-of-way by their very nature compromise present and future use of streets, street improvements, and pedestrian/sidewalk accommodations.
- 3) Approved leases/licenses shall be required to carry appropriate insurance.

Costs

Lease costs must take into consideration the degree to which the proposed use would affect the immediate and long term use of the City property requested.

Annual lease/license fees of 10% of the fair market value of the at-grade City property being sought for lease will be assessed because of the nature of the use and impacts to the City for future uses.

Examples demonstrating the application of the above fees to various uses are as follows:

- 1) **Request:** Below grade use (beneath the street) within the right-of-way for underground parking. Request for 180 linear feet by 30 feet within the existing right-of-way. All access to the structure will be from the adjacent private property.

**Value:** The land to be leased is valued at \$100 per square foot in an appraisal ordered by the City. Therefore, 5400 square feet at \$100 is \$540,000.00.

**Considerations:** The project does not preclude future widening of the street or other city use of the surface area.

**Fee:** Lease at 10% of value per year or \$54,000.00 per year for 30 years.

- 2) **Request** for private utility crossing below grade perpendicular to the street. Request is for a length of 30 feet crossing a 110 foot wide street or 3,300 square feet of right-of-way.

**Value:** Property valued at \$35 per square foot or \$115,500 based on appraisal of the city property.

**Considerations:** Does not affect surface use of the street right-of-way.

**Fee:** Leased 10% or \$11,550 per year for 30 years.

- 3) **Request:** Multi story residential structure projects 10 feet into the right-of-way for floors above the third story. The area in question consists of 200 square feet at ground level.

**Value:** The land is valued at \$80 per square foot based on an appraisal of city property.

**Considerations:** The area over the right-of-way is an enclosed living area and not a balcony.

**Fee:** The lease is valued at 10% per year and when applied to a value for the land of \$16,000.00 results in an annual rent rate of \$1600.00 per year.

LICENSE FOR SPECIAL USE  
(RIGHT-OF-WAY ENCROACHMENT)

This License for Special Use (Right-of-Way Encroachment) is entered into this \_\_\_\_\_ of \_\_\_\_\_, 200\_\_\_\_, between the City of Tempe ("City" or "Licensor"), a municipal corporation, and the undersigned ("Licensee").

**RECITALS**

A. City owns the right-of-way or other land described in *Exhibit A* hereto, together with all rights and privileges appurtenant thereto (collectively, the "Land").

B. Licensee owns the adjacent real property, described on *Exhibit B* hereto (the "Licensee Property").

C. In connection with its development of the Licensee Property, Licensee desires to construct certain elements more particularly described on *Exhibit C* (the "Encroachments"), that will encroach upon the Land.

D. City is willing to grant Licensee a non-exclusive right to enter upon and use that portion of the Land more particularly identified on *Exhibit D* hereto (the "Encroachment Area"), but only upon Licensee's strict and absolute compliance with the terms of this License.

**AGREEMENT**

NOW THEREFORE, the parties hereby agree as follows:

1. License. City hereby grants Licensee a non-exclusive license to allow the Encroachments to occupy the Encroachment Area, on the terms and conditions set forth herein. Such License also includes the non-exclusive right to go upon the Land for the purpose of constructing and maintaining the Encroachments. This License does not grant Licensee any right, title or interest in or to the Land or the Encroachment Area.

2. Construction of Encroachments.

A. Plans. Licensee shall diligently undertake to develop plans and specifications for the construction of the Encroachments, and shall submit same to City for approval in accordance with City's usual procedures. Once approved by the City, Licensee shall not make any changes to the approved plans and specifications without the prior written consent of City. The Encroachments shall not interfere with Licensor's use of the Land, and if in Licensor's opinion, the design will with Licensor's use, Licensor may require that Licensee redesign them.

B. Construction. Licensee shall construct the Encroachments in accordance with the approved plans and specifications at its own cost and expense. Within thirty (30) days after construction of the Encroachments is completed, Licensee shall provide City with an as-built survey or other certified document showing the exact location, size and dimensions of the Encroachments. If shall be a default under this License if the Encroachments do not conform to the approved plans and specifications, or are constructed outside the Encroachment Area, and in such event City shall have the absolute right to require their removal and relocation. Prior to commencement of construction, Licensee shall furnish to City

reasonably satisfactory evidence that Licensee has available sufficient funds or firm lending/financing commitments to complete construction of the Encroachments. Such evidence may include, by way of example, a performance bond, in an amount equal to the total estimated construction cost, supplied by Licensee's contractor or subcontractor.

All construction shall be performed pursuant to, and consistent with, all applicable state and local laws and regulations. In addition to any other access rights granted to City in this License, City shall have the right to enter the Encroachment Area during construction to verify compliance with all applicable laws and the provisions of this License. Licensee shall provide security for the construction site at its own expense, and shall be responsible for any vandalism, theft or criminal damage to the Encroachments or to any other facilities existing on the Land during construction.

Construction on the Land shall be performed only in accordance with approved construction documents and plan. At least ten (10) days prior to the beginning of any construction on the Encroachment Area, Licensee shall give Licenser notice of the date that construction will begin and a schedule listing all construction activities and the dates when such construction activities will be performed. Licensee shall give Licenser written notice of all changes in the schedule and delays in construction immediately upon it being reasonably foreseeable that such change or delay will occur. Licenser may request that Licensee alter the construction schedule if and to the extent necessary to prevent any material interference with Licenser's use of the Land.

C. Relocation. If relocation of non-structural Encroachments is necessitated by Licenser's use of existing facilities or the construction of improvements by or on behalf of Licenser, Licensee shall bear the entire actual cost of relocating the non-structural Encroachments. Licenser shall not exercise its right to require relocation of the Encroachments in an unreasonable or arbitrary manner, and warrants to Licensee that as of the date of this License, relocation of Licensee's facilities is not expected or anticipated as a result of Licenser's existing plans for the Encroachment Area.

D. Removal. Licensee shall retain title to the Encroachments, and all renewals and replacements thereof. Licensee shall remove the Encroachments in connection with any redevelopment of the Licensee Property or upon the expiration or termination of this License.

3. Term. Unless a different term is specified in any written development agreement between City and Licensee, the term of this License shall be for a period of \_\_\_\_ years, commencing \_\_\_\_\_, \_\_\_\_\_ and end on \_\_\_\_\_, \_\_\_\_\_, unless terminated earlier as provided herein. If Licensee is not in default hereunder and has performed its other obligations under this License to City's reasonable satisfaction, Licensee shall have an option to renew this License for \_\_\_\_ additional terms of \_\_\_\_ years each, exercisable by giving City written notice not less than 180 days prior to the expiration date of the then current term.

4. Fees. Unless pursuant to a written development agreement between City and Licensee in which City waives or establishes a different fee schedule, Licensee shall pay to City the following fees for use of the Encroachment Area:

- A. \$\_\_\_\_\_ per year for above-ground Encroachments; plus
- B. \$\_\_\_\_\_ per year for below-ground Encroachments; plus
- C. \$\_\_\_\_\_ per year for at-grade Encroachments.

Fees shall be payable in advance on the first day of the term of this License, and each anniversary thereof during the term of this License, without notice, demand, deduction or set-off whatsoever.



Concurrently with each Fee payment, Licensee shall pay to Licensor all federal, state and local excise, sales, privilege, gross receipts and other similar taxes lawfully imposed on or paid by Licensor as a result of any License Fees received by Licensor under this License. Licensee shall pay all property taxes, if any, levied on the Encroachments.

All amounts paid by Licensee to Licensor as a result of damages, costs, expenses and sums incurred by Licensor hereunder as a result of Licensee's default shall be deemed to be License Fees.

Any payment due under this License that is not paid within 30 days after notice of such default shall bear interest from the date payment is due at the rate of eighteen percent (18%) per annum. Licensor shall have all the rights and remedies provided herein and by law for Licensee's failure to pay any of the amounts specified in this Section 4.

Within 30 days of receipt of an invoice therefore, Licensee shall pay any incremental increase in City's operation and maintenance costs on the Easement Area resulting from Licensee's exercise of its rights hereunder; Licensor shall incur no liability for any costs of repairing or replacing Licensee's improvements within the Encroachment Area, damaged as a result of Licensor's operation and maintenance of its facilities, unless due to negligent or willful acts or omissions of Licensor or its agents or employees.

The License Fees payable during each renewal term shall be increased by an amount equal in percentage to the percentage increase, if any, which has then occurred in the CPI during the term then ending; provided that the adjustment shall not be less than 3% per year and no more than 5% per year. For purposes hereof, "CPI" shall mean the Consumer Price Index for "All Urban Consumers, West Region All Items," issued by the Bureau of Labor Statistics of the United States Department of Labor. If the Department of Labor ceases to publish the CPI, then City and Licensee shall select a comparable index by mutual agreement; however, if they are unable to agree, the dispute shall be submitted to binding arbitration in accordance with this License.

5. Use of Encroachment Area. Licensee shall use the Encroachment Area only for supporting or housing the Encroachments or allowing them to occupy the airspace included within the Encroachment Area, and for no other purpose whatsoever. Licensee shall not construct or create any encroachments or facilities other than those defined as Encroachments in, on or about the Encroachment Area or the Land.

Licensee shall not make any material alternation, improvement, addition or other installation to the Encroachments or otherwise on the Encroachment Area without City's prior written consent. If Licensee desires to make any such material alteration, improvement, addition or installation, Licensee shall submit a written request to City, together with plans of the proposed alteration, improvement, addition or installation, and Licensee shall not commence such work unless and until the City has granted its approval thereto in writing, which approval shall not be unreasonably withheld. Any alteration or improvement made by Licensee shall be completed expeditiously and in compliance with all laws and ordinances and all rules and regulations of any and all governmental authorities having jurisdiction of or over the Encroachment Area.

6. Nonexclusive Rights. This License is nonexclusive and nothing herein shall be construed to prevent or restrict licensor from granting other privileges to use the Land or the Encroachment Area in any manner not inconsistent with Licensee's use of the Encroachment Area in accordance with this License. Licensor shall give Licensee at least ninety (90) days prior written notice of any construction, use, operation, maintenance, relocation or removal affecting the Encroachment Area that will materially disrupt the Licensee's use and enjoyment of thereof or of the Encroachments; provided, however, that such notice may be given in such shorter period as Licensor determines to be reasonable under prevailing

circumstances, or with no notice in the event of an emergency where no notice is feasible. Nothing in this License shall be construed to deny or lessen the powers and privileges granted Licensor by the laws of the State of Arizona. Licensor shall not be liable to Licensee for any damage to the Encroachments, unless due to negligent or wrongful acts or omissions of Licensor or its agents or employees. City or any of its agents shall have the right upon reasonable notice to enter upon the Encroachment Area at any time during the term of this License to examine same for any purpose whatsoever.

7. Existing Easements and Licenses. This License is subject to all existing encumbrances of record, including easements and licenses to which the Land is subject. It shall be Licensee's obligation and responsibility to ascertain the rights of all third parties in the Encroachment Area. Licensor consents only to the use of the Encroachment Area for the purposes described herein. Nothing in this License shall be construed as Licensor's representation, warranty, approval or consent regarding rights in the Encroachment Area held by other parties. Licensee shall indemnify, defend and hold Licensor harmless from any liability arising out of any dispute or claim regarding actual or alleged interests in the Encroachment Area, affecting Licensee's interests created herein.

8. Compliance with Laws. Licensee shall comply with all laws, statutes, acts, ordinances, rules, regulations, codes, and standards of legally constituted authorities with jurisdiction, applicable to Licensee's use of the Encroachment Area. Licensee shall not use the Encroachment Area for any purposes in violation of any applicable zoning or other laws. Licensee shall obtain or cause to be obtained at its expense, all permits, approvals and authorizations required by Licensee's actions pursuant to this License.

9. Inspection Rights. Licensor may enter any part of the Encroachment Area at any time, including during construction of the Encroachments.

10. Assignment. Licensee shall neither assign this License nor sub-license all or any portion of the Licensed Property. This License shall run with the Licensee's Property. Licensee's rights hereunder are not assignable in whole or in part to any person or entity that does not also acquire an interest in the Licensee's Property. Any attempted assignment in violation of the foregoing shall be void.

11. Operating Costs; City Not Responsible.

A. Licensee Responsible. Licensee shall be responsible for constructing all utility connections (such as sewer, power, water, etc.) required for proper operation of the Encroachments, and shall pay all costs, expenses and fees associated with the Encroachments. Licensee shall obtain separate metering for all utility charges at its own expense.

B. City Nonresponsibility. City shall have no responsibility, obligation or liability under this License whatsoever with respect to any of the following, all of which shall be and remain the sole responsibility and obligation of Licensee:

- (a) any utilities supplied to the Encroachment Area for Licensee's use;
- (b) disruption in the supply of services or utilities to the Encroachment Area;
- (c) maintenance, repair or restoration of the Encroachments;
- (d) any other cost, expense, duty, obligation, service or function related to the Encroachments.

12. Indemnification. To the extent not prohibited by law, Licensee, its successors and assigns, shall indemnify, release, defend and hold harmless Licensor, its, Council members, officers, employees, agents, representatives, volunteers, successors and assigns against and from any damage claim, demand, lawsuit or action of any kind for damages or loss, whether such damage or loss is to person or property, arising in whole or in part out of: (a) negligent or otherwise wrongful acts or omissions of Licensee, its agents, contractors, agents, invitees, officers, directors, or employees; (b) Licensee's use or occupancy of the Land and the Encroachment Area for the purposes contemplated by this License, including but not limited to claims by third parties who are invited or permitted onto the Land or Encroachment Area, either expressly or impliedly, by Licensee or by the nature of Licensee's improvements or other use of the Land and Encroachment Area pursuant to this License; or (c) Licensee's failure to comply with or fulfill its obligations established by this License or by law. Such obligation to indemnify shall extend to and encompass all costs incurred by Licensor in defending against such claims, demands, lawsuits or actions, including but not limited to attorney, witness and expert fees, and any other litigation related expenses. In the event that any action or proceeding shall be brought against City by reason of any claim referred to in this Paragraph, Licensee, upon written notice from City, shall at Licensee's sole cost and expense, resist or defend the same through counsel selected by Licensee and reasonably approved by City. Licensee's obligation pursuant to this Section shall not extend to claims, demands, lawsuits or actions for liability attributable to the sole exclusive gross negligence or intentional misconduct of City, its Council members, officers, employees, agents, representatives, volunteers, successors or assigns. The provisions of this Section shall survive termination of this License.

13. Insurance.

A. Licensee shall not commence construction activities until Licensee has obtained all of the insurance required herein from a company or companies licensed to do business in the State of Arizona, and acceptable to City, and Licensee shall continue to maintain all such insurance in full force and effect from the commencement construction activities until termination or expiration or termination of this License.

B. Licensee shall obtain and maintain the insurance coverage specified in *Exhibit E* attached hereto and incorporated herein; provided that Licensee need not obtain Worker's Compensation coverage until the first day that Licensee has engaged any person as an employee, and need not obtain Fire and Casualty Coverage until Licensee has completed construction of the Encroachments.

C. Licensee shall furnish City with original certificates (or certified copies) of the aforementioned insurance policies, in form and with insurers acceptable to the City's Risk Manager (or designee). Each insurance policy shall be endorsed to state that coverage shall not be suspended, voided, and/or cancelled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City's Risk Manager.

D. Licensee shall include all contractors and subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each contractor and subcontractor. All insurance coverage for contractors and subcontractors shall be subject to all of the requirements stated herein for Licensee.

14. Fire and Other Casualty.

A. Obligation to Rebuild. If some or all of the above-ground Encroachments are damaged or destroyed, partially or totally from any cause whatsoever, whether or not such damage or destruction is covered by insurance, then Licensee shall repair, restore and rebuild the Encroachments and the Encroachment Area to its condition existing immediately prior to such damage or destruction and this

License shall remain in full force and effect. Such repair, restoration and rebuilding (all of which are herein called "repair") shall be commenced within a reasonable time after such damage or destruction has occurred and shall be diligently pursued to completion.

D. No Abatement of License Fee. Notwithstanding the partial or total destruction of the Encroachment Area and any part thereof, and notwithstanding whether the casualty is insured or not, there shall be no abatement of the License Fees or of any other obligation of Licensee hereunder by reason of such damage or destruction unless the License is terminated by virtue of other express terms of this License.

15. Prohibition Against Liens. Licensee shall not create a lien on or security interest in the Land, the Encroachment Area or Licensee's interest under this License whether by mortgage, deed of trust, collateral assignment or otherwise. Licensee shall not permit any liens to be placed on the Land or the Encroachment Area, but if the Encroachment Area or any part thereof, or Licensee's interest therein, shall at any time during the term of this License become subject to any vendor's, mechanic's, laborer's, or materialmen's lien based upon the furnishing of material or labor to Licensee, Licensee shall cause the same, at Licensee's expense, to be discharged or bonded over within thirty (30) days after notice thereof.

16. Maintenance and Repairs. Licensee shall at all times, at its sole cost and expense, keep and maintain in good, sanitary and safe condition and in substantial repair the Encroachments and the Encroachment Area on which they are located, and all other improvements of any kind erected, installed or made on or within the Encroachment Area by Licensee.

17. Nuisance. Notwithstanding anything in this License to the contrary, Licensee shall not commit or permit any nuisance or other act, whether noise, odor, smoke, sewage, chemical wastes, or otherwise to exist on the Encroachment Area. Licensee shall not obstruct or cause to be obstructed any public or private roadways.

18. Licensee's Representations and Warranties. The individual executing this License on behalf of Licensee represents and warrants: (i) that he or she is authorized to do so; (ii) that he or she has full legal power and authority to bind Licensee and its successors in accordance with the terms herein and, if necessary, has obtained all required consents or delegations of such power and authority (whether from any partner, owner, spouse, shareholder, director, member, manager, creditor, investor, developer, governmental authority, judicial or administrative body, association, or other person or entity); and (iii) that the execution, delivery, and performance by Licensee of this License and all other related documents will not constitute a default under any agreement to which Licensee is a party.

19. Condemnation.

A. If the Land or the Encroachment Area shall be taken or condemned under the right of eminent domain or if such a substantial part thereof shall be taken as shall result in the portion remaining being unsuitable for the permitted uses, then this License shall terminate as of the date upon which title shall vest in such condemning authority; and the net awards or payments on account of such taking shall be apportioned as follows:

(a) Licensee shall receive that portion attributed to the then value of Licensee's Encroachments.

(b) City shall receive that portion attributed to the then value of the Encroachment Area and the Land.

B. If only a part of the Encroachment Area shall be so taken or condemned and the part not so taken can be adapted for the permitted uses, this License shall remain in full force and effect without any abatement or reduction in rent, and Licensee, whether or not its portion of the awards or payments, if any, on account of such taking shall be sufficient for the purpose, at its own expense shall promptly commence and complete the restoration of the buildings and improvements on the Encroachment Area as nearly as possible to their value, condition and character immediately prior to such taking or condemnation.

C. In the event of any such taking or condemnation in whole or in part, the entire award shall be paid to City in trust for disbursement as herein provided, and Licensee hereby assigns to City the right to receive such award or awards in trust.

D. If the award or payments on account of any taking shall not be divided or apportioned by the court or the condemning authority into the portions set forth in Section A, and if City and Licensee shall be unable to agree on such apportionment, then such apportionment shall be determined by appraisers. City and Licensee shall each appoint an appraiser, and the two appraisers so appointed shall promptly appoint a third appraiser. The three appraisers shall jointly determine the appropriate apportionment and shall render their decision within thirty (30) days after the appointment of the third appraiser. The appraisal agreed upon by a majority shall be binding upon the parties. All appraisers shall be members of the American Institute of Real Estate Appraisers or, if such Institute shall not then exist, members of its successor organization or an organization of substantially equivalent stature. The fees of the appraisers shall be borne equally by City and Licensee.

20. Easements. City reserves the right to ingress and egress on the Encroachment Area and Land for the placement of easements for public utility or roadway purposes, as may from time to time be needed by City, provided however, that City shall conduct all of its maintenance and construction operations in a manner which will not unreasonably interfere with the conduct of the activities of the Licensee or the use and enjoyment of the Encroachment Area by the Licensee.

21. Default; Termination.

A. Expiration. This License shall expire on the earlier of (a) the date the Encroachments are demolished, or (b) the end of the stated term if not renewed in accordance with Section 3. If not previously demolished, Licensee shall at his own expense, remove the Encroachments and restore the Encroachment Area to its original condition within thirty (30) days after expiration of this License.

B. Default. The occurrence of any one or more of the following events and the continuance of such event beyond any applicable Grace Period, shall constitute a Default on the part of Licensee:

(a) Licensee fails to pay the License Fee or any other sum required to be paid by Licensee hereunder; or

(b) Licensee fails to perform any covenant, condition, or agreement to be performed by Licensee pursuant to this License or breaches any representation or warranty made by Licensee in this License or otherwise in connection with the transaction of which this License is a part; or

B. Grace Periods. "Grace Period" means the number of calendar days after City gives notice in accordance with Section 29. If a Default involves Licensee's obligation to pay money, the applicable Grace Period shall be 10 days. If a Default involves the performance or non-performance of an act, or the occurrence or non-occurrence of an event or circumstance, the Grace Period shall be 30 days; provided that if the nature of the Default is such that it cannot reasonably be cured within 30 days, then City shall

not pursue its Default remedies if Licensee commences the cure within 30 days and diligently pursues the same to completion within 90 days. Notwithstanding the foregoing, there shall be no Grace Period applicable to a Default based upon a breach of a representation or warranty of Licensee, or in the breach of Licensee's covenant to maintain insurance.

C. City's Remedies. City shall have the following remedies upon Licensee's default, which remedies shall not be exclusive, and are cumulative in addition to any remedies now or later allowed by law:

a. City may cure the default at Licensee's expense, by taking any action reasonably determined by Licenser to be necessary to correct such default, including without limitation making any repair or modification to or removing any of the Encroachments. Licensee shall reimburse Licenser for all costs it incurs to correct such default within thirty (30) calendar days after Licenser presents Licensee with a statement of such costs. Licensee hereby releases and agrees to indemnify, defend and hold harmless Licenser from all damages resulting to Licensee from the correction of such default in accordance with this Section 21, including, without limitation, those damages arising from all repairs or modifications to or removal of any of the Encroachments.

b. City may continue this License in full force and effect, in which case the License Fees shall be increased by 10% per month for each month during which the Default continues to exist.

c. City may terminate this License thereby ending Licensee's right to use the Encroachment Area at any time. City may immediately remove any Encroachments, without liability or obligation of any kind to Licensee or any other person, without prior notice and without releasing Licensee from any of its obligations under this License. City shall be entitled to recover from Licensee all damages incurred by reason of Licensee's Default. No act by City other than giving notice to Licensee shall terminate this License.

d. City shall be entitled to recover from Licensee all of City's expenses, costs and damages arising out of any Default, including, but not limited to, cleanup, repair, alterations, legal expenses (whether or not suit is brought), and costs and expenses of litigation.

e. City may also exercise any other rights City may have at law or in equity. City may exercise any remedy without court action, or by one or more court actions, and in exercising any remedy may obtain partial relief without waiving its right to further relief. The exercise of any remedy by City shall not waive City's right to exercise any other remedy.

f. Except as otherwise provided herein, City shall also be entitled to collect interest on any unpaid sums due from the date due or the date advanced until paid at the Default Rate.

22. Integration. This License represents the entire understanding of City and Licensee as to those matters contained herein except as they may be modified, amended or waived in a written development or other written agreement between City and Licensee, and no prior oral or written understanding shall be of any force or effect with respect to those matters covered thereby. This License shall be governed by the laws of the State of Arizona and construed as if drafted by both City and Licensee. This License is the product of an arms-length negotiation, and should not be presumably construed against either party.

23. Amendment. This License may only be amended by a written agreement (including without limitation, a development agreement entered before or after execution of this License) executed by City and Licensee, after approval by the Tempe City Council.

24. Attorney's Fees. In the event that either party brings legal action to enforce any terms of this License, the prevailing party in said litigation shall be entitled to attorneys' fees in a reasonable amount.

25. Time of Essence. Time shall be of the essence in the performance of every term, covenant, and condition of this License.

26. Headings. The section and paragraph headings contained herein are inserted only for convenience of reference and are in no way to be construed as a part of this License or as a limitation of the scope of the particular paragraph to which they refer.

27. Benefit. This License shall insure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrator, legal representatives, successors, and permitted assigns.

28. Notices. Notices required or permitted to be given hereunder shall be sent to the City at the addresses set forth below, and to Licensee at the address stated below its signature block:

City: City of Tempe  
City Manager's Office  
31 East 5<sup>th</sup> Street  
Tempe, AZ 85281

With a copy to: City of Tempe  
City Attorney's Office  
21 East Sixth Street, Suite 201  
Tempe, AZ 85281

IN WITNESS WHEREOF, the parties hereto have executed this License as of the date and year first above written.

City:  
CITY OF TEMPE, a municipal corporation

By: \_\_\_\_\_  
Hugh L. Hallman, Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

Licensee:

By: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Telephone: \_\_\_\_\_

Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_